

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   WENDY SIPOREN, SHAREEN VOGEL,  
5                                   CHRISTINE LACHNER and MEDFORD  
6                                   CITIZENS FOR RESPONSIBLE DEVELOPMENT,  
7                                                           *Petitioners,*

8  
9                                                           vs.

10                                                           CITY OF MEDFORD,  
11                                                                                   *Respondent,*

12  
13                                                           and

14                                                           WAL-MART STORES, INC.,  
15                                                                                   *Intervenor-Respondent.*

16  
17                                                           LUBA No. 2006-124

18  
19                                                           ORDER

20  
21                                   **INTRODUCTION**

22                                   The parties seem determined to make this case as procedurally complicated as  
23 possible. We set out some of the relevant facts in our November 3, 2006 Order:

24                                   **\*\*\* \*\*The Parties**

25                                   “The parties in this consolidated appeal are the City of Medford, Wal-Mart  
26 Stores, Inc. (Wal-Mart), South Gateway Partners (SGP), Medford Citizens for  
27 Responsible Development (MCRD), Wendy Siporen (Siporen), Shareen  
28 Vogel (Vogel), and Christine Lachner (Lachner). \*\*\*

29                                   **\*\*\* \*\*Wal-Mart I**

30                                   “On April 2, 2004, the city’s site plan and architectural commission granted  
31 Wal-Mart’s application for site plan and architectural review approval for a  
32 206,533-square foot retail store on 20.51 acres. That decision was appealed to  
33 the city council. Although the city council rejected SGP’s arguments that  
34 Wal-Mart’s transportation impact analysis (TIA) was inadequate, the city  
35 council ultimately denied Wal-Mart’s application, concluding that ‘the  
36 proposal was incompatible with uses and development on adjacent land.’  
37 That city council decision was appealed to LUBA by Wal-Mart (LUBA No.  
38 2004-095) and by SGP (LUBA No. 2004-096). Wal-Mart, SGP, Siporen,  
39 Vogel and Lachner all participated in the city proceedings that led to this city

1 council decision. MCRD apparently did not participate in those initial  
2 proceedings.

3 “The Wal-Mart and SGP appeals were consolidated for LUBA review.  
4 Siporen intervened in the Wal-Mart appeal on the side of the city, but did not  
5 file a brief. LUBA sustained one of Wal-Mart’s assignments of error and  
6 three of SGP’s assignments of error. LUBA remanded the city council’s  
7 decision on March 11, 2005. *Wal-Mart Stores, Inc. v City of Medford*, 49 Or  
8 LUBA 52 (2005)(*Wal-Mart I*).

9 **\*\*\* The City’s Proceedings on Remand**

10 “At a November 17, 2005 meeting, the city council heard argument from Wal-  
11 Mart and SGP regarding how the city should proceed to respond to LUBA’s  
12 remand. The city told Siporen that she did not have standing to participate in  
13 the city’s proceedings on remand. On December 1, 2005, the city council  
14 approved Resolution 2005-270. In that resolution, the city council, among  
15 other things, remanded the matter to the site plan and architectural  
16 commission for ‘notice and a public hearing on the limited compatibility  
17 elements; and only additional argument from WalMart, SGP and staff on the  
18 traffic issues[.]’ In effect, the city bifurcated its proceedings on remand into  
19 two separate efforts—one to address what the parties refer to as the ‘site  
20 compatibility’ issues that resulted in LUBA sustaining Wal-Mart’s first  
21 assignment of error and a second to address what the parties refer to as ‘traffic  
22 issues.’

23 “The site plan and architectural commission held a public hearing on February  
24 21, 2006. That public hearing was limited to consideration of site  
25 compatibility issues. Siporen, Vogel and MCRD submitted written testimony.  
26 Record 506-36. The site plan and architectural commission held a public  
27 meeting on March 3, 2006, to consider legal arguments concerning the traffic  
28 issues. Only the city, Wal-Mart and SGP were permitted to present legal  
29 arguments. Lachner attempted to submit written arguments regarding traffic  
30 issues on behalf of herself, Siporen, Vogel and MCRD. Record 476, 483-86.  
31 Lachner was informed that the city would not consider that testimony,  
32 because none of them had standing to address traffic issues. Record 476. The  
33 site plan and architectural commission later issued two orders—one order to  
34 resolve site compatibility issues and one order to resolve traffic issues.  
35 Record 460-63. Both orders are supported by the same findings. Record 464-  
36 72. In those findings the site plan and architectural commission found that  
37 Siporen, Lachner and MCRD did not have standing to submit oral or written  
38 testimony on the traffic issues. Record 464. Intervenor-petitioners appealed  
39 the site plan and architectural commission orders to the city council. Record  
40 281-94. In that appeal, intervenor-petitioners asserted, among other things,  
41 that the city was improperly denying them standing to participate regarding  
42 the traffic issues. Record 281-83.

1 “The city council similarly denied petitioners standing to participate with  
2 regard to the traffic issues. Record 81-82. Intervenor-petitioners objected to  
3 the city’s refusal to recognize their standing to participate in the city’s  
4 consideration of the traffic issues. Record 166. The city council adopted two  
5 nearly identical resolutions to resolve the site compatibility and traffic issues.  
6 Resolution 2006-141 (site compatibility); Resolution 2006-14[2] (traffic  
7 issues). Record 79-106.

8 **\*\*\* The Second Round of LUBA Appeals**

9 “Resolutions 2006-141 and 2006-142 generated three LUBA appeals. In  
10 LUBA No. 2006-112, SGP appeals Resolution No. 2006-141. In LUBA No.  
11 2006-113, SGP appeals Resolution No. 2006-142. In LUBA No. 2006-124,  
12 Siporen, Vogel, Lachner and MCRD appeal Resolution No. 2006-141. For  
13 some reason, Siporen, Vogel, Lachner and MCRD did not file their own  
14 LUBA appeal to challenge Resolution 2006-142.

15 “Although Siporen, Vogel, Lachner and MCRD did not file their own LUBA  
16 appeal to challenge Resolution 2006-142, Siporen, Vogel, Lachner and  
17 MCRD move to intervene on the side of petitioner SGP in LUBA Nos. 2006-  
18 112 and 2006-113. The city opposes the motion to intervene. \* \* \*” *South*  
19 *Gateway Partners v. City of Medford*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2006-  
20 112, 2006-113, 2006-124, Order, November 3, 2006) (slip op 2-5).

21 In our November 3, 2006 Order, we ultimately found that Resolutions 2006-141 and  
22 2006-142 were simply a continuation of the same proceedings that led to the decision that  
23 was remanded in *Wal-Mart I*. Because petitioners Siporen, Vogel and Lachner all appeared  
24 in the initial city proceedings that led to the city decision that was remanded in *Wal-Mart I*,  
25 that appearance was sufficient to constitute the appearance that is required by ORS  
26 197.830(2)(b) to appeal Resolution 2006-141 to LUBA. We also found that petitioners’  
27 attempt to appear in the proceedings on remand with regard to the transportation issues,  
28 which was rejected by the city, was sufficient to constitute the appearance that is required by  
29 ORS 197.830(7)(b) to have standing to intervene in the SGP LUBA appeal of Resolution  
30 2006-142.

31 Subsequently, SGP moved to dismiss its LUBA appeals of Resolutions 2006-141 and  
32 2006-142. On January 22, 2007, we issued a final order dismissing LUBA Nos. 2006-112  
33 and 2006-113. Therefore, only petitioners’ appeal of Resolution 2006-141, which is the

1 city's attempt to resolve the site compatibility issues identified in *Wal-Mart I*, remains before  
2 us.

3 **MOTION TO CONSIDER EXTRA-RECORD EVIDENCE**

4 In the findings supporting Resolution 2006-141, the city takes the position that  
5 petitioners lacked standing to participate in the city's proceedings on remand following *Wal-*  
6 *Mart I*. The city apparently adhered to that position with regard to the proceedings  
7 concerning transportation issues, but in fact allowed petitioners to appear and present  
8 evidence and argument concerning site compatibility issues. In their first assignment of  
9 error, petitioners assign error to the city's decision to deny petitioners standing to participate  
10 in the city's proceedings on remand. In their second and third assignments of error,  
11 petitioners argue the city's findings concerning the site compatibility issues are inadequate.

12 Petitioners' petition for review was filed on January 24, 2007. Under our rules, the  
13 city's and Wal-Mart's response briefs were due on February 14, 2007. However, on  
14 February 9, 2007, the city filed a motion under OAR 661-010-0045 asking that we consider  
15 certain extra-record evidence.<sup>1</sup> On February 13, 2007 we issued an order suspending  
16 deadlines in this appeal until the city's February 9, 2007 motion could be resolved. For the  
17 reasons set out below, we now deny the city's February 9, 2007 motion.

18 **A. Disputed Allegations of Fact**

19 The city's entire argument in support of its motion to consider extra-record evidence  
20 is set out below:

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<sup>1</sup> OAR 661-010-0045(1) sets forth the grounds upon which LUBA may consider extra-record evidence:

"Grounds for Motion to Take Evidence Not in the Record: [LUBA] may, upon written motion, take evidence not in the record *in the case of disputed factual allegations* in the parties' briefs concerning unconstitutionality of the decision, *standing*, *ex parte* contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845." (Emphasis added).

1 “The [proposed extra-record] evidence is a transcribed telephone message  
2 from William Mansfield, Attorney at Law, wherein he concedes that neither  
3 he nor Wendy Siporen have standing to participate in the remand. \* \* \*

4 “The evidence pertains to: the legal standards for procedures on remand; the  
5 standing of Siporen, Vogel, Lachner (Medford Citizens for Responsible  
6 Development) to argue portions of this appeal to [LUBA]; and the argument  
7 that petitioners invited their assigned error.” Motion to Take Evidence Not in  
8 Record 1.<sup>2</sup>

9 The city’s argument is insufficiently developed to demonstrate that one or more of the  
10 circumstances set out in OAR 661-010-0045(1) are present here. Identifying “the legal  
11 standards for procedures on remand” is not one of the grounds for considering extra-record  
12 evidence under OAR 661-010-0045(1). *See* n 2. The reference to “standing” in OAR 661-  
13 010-0045(1) is a reference to standing to appeal a land use decision or limited land use  
14 decision to LUBA. We have already concluded that petitioners have standing to bring this  
15 appeal of Resolution No. 2006-141 to LUBA. OAR 661-010-0045(1) does not permit LUBA  
16 to consider extra-record evidence to determine if petitioners lacked standing to participate in  
17 the city’s proceedings on remand. Finally, whether petitioners may have waived their right  
18 “to argue portions of this appeal” is not one of the grounds for considering extra-record  
19 evidence under OAR 661-010-0045(1). At least, the city makes no attempt to explain why it  
20 thinks that it is.

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<sup>2</sup> The offered transcript, is as follows:

“This is Bill Mansfield returning John HuttI’s call. It’s Thursday morning, November the  
10<sup>th</sup>. My phone number is 779-2521.

“John: I agree that I and Wendy Siporen are no longer parties of record and are not entitled  
to be heard on the matter. I am still interested, of course, in the WalMart matter but not  
entitled to be heard.

“I hope the City plays it tough cause I don’t want WalMart in there.

“Talk to you later.

“Bye.” Motion to Take Evidence Not in Record, Exhibit A.

1           Finally, we also note, based on petitioners' response to the city's February 9, 2007  
2 motion, that it does not appear to us that there are any disputed *factual* allegations. OAR  
3 661-010-0045(1) does not authorize the submission of extra record evidence unless there are  
4 disputed factual allegations concerning one or more of the grounds listed in the rule.  
5 Petitioners dispute the *legal significance* of Mansfield's telephone message, but we do not  
6 understand petitioners to dispute the substance of Mansfield's telephone message or that the  
7 message was left with the city on November 10, 2005.<sup>3</sup> At this point the city's allegation  
8 that Mansfield left a message with the city on November 10, 2005 and the city's allegations  
9 regarding the substance of that message are undisputed. The city is free to make any  
10 arguments it wishes in its response brief concerning its view of the legal significance of  
11 Mansfield's telephone message. Such arguments would likely constitute "new matters,"  
12 within the meaning of OAR 661-010-0039, and, if so, petitioners may move to file a reply  
13 brief to respond to those arguments.<sup>4</sup> Unless and until petitioners actually dispute the city's  
14 factual allegations, the city's motion requesting that LUBA consider extra-record evidence is  
15 premature.

16           The city's February 9, 2007 motion requesting that LUBA consider extra-record  
17 evidence is denied.

18           The city's and Wal-Mart's response briefs shall be due 21 days from the date of this  
19 order.<sup>5</sup> LUBA's final opinion and order shall be due 56 days from the date of this order.

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<sup>3</sup> Petitioners argue that (1) Mansfield was not petitioner Siporen's attorney, (2) Siporen never waived her standing to participate locally and Mansfield was not authorized to do so, (3) the city was not entitled to rely on Mansfield's erroneous legal position concerning standing to participate locally, and (4) the city should have included the transcript in the Supplemental Record and should not be allowed to place that transcript before LUBA now.

<sup>4</sup> If petitioners do dispute the accuracy of the Mansfield phone message or dispute that the message was left with the city, a motion under OAR 661-010-0045 might be appropriate at that time to demonstrate that LUBA should accept the transcript based on one or more of the grounds specified in OAR 661-010-0045(1).

<sup>5</sup> In a March 13, 2007 letter, petitioners advised the Board that the parties had agreed that respondents would have seven days after the Board's order to file their response briefs. In view of LUBA's delay in issuing this order, we believe allowing the city and Wal-Mart 21 days to file their response briefs is appropriate.

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Dated this 12<sup>th</sup> day of June, 2007.

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Michael A. Holstun  
Board Chair